

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JEFFREY OWEN
d/b/a C & J EXPRESS

Debtor

CASE NO. 97-65765
Chapter 7

Jointly Administered

IN RE:

CHRISTINE COLONELLO
d/b/a C & J EXPRESS

Debtor

CASE NO. 97-65766
Chapter 7

JAMES C. COLLINS, TRUSTEE

Plaintiff

vs.

ADV. PRO. NO. 00-80133A

JEFFREY OWEN, d/b/a C&J EXPRESS
CHRISTINE COLONELLO, d/b/a C&J EXPRESS

Defendants

APPEARANCES:

JAMES C. COLLINS, ESQ.
Attorney for Trustee
P.O. Box 713
Whitney Point, New York 13862-0713

THOMAS, COLLISON & MEAGHER
Attorney for Defendants
1201 Monroe St., P.O. Box 329
Endicott, New York 13761-0329

ROBERT F. WHALEN, ESQ.

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is the request of James C. Collins (“Trustee”) that the Court deny the discharge of Jeffrey Owen (“Owen”) and Christine Colonello (“Colonello”), d/b/a C&J Express Company (“Debtors”) pursuant to §§ 727(a)(2)(B), 727(a)(3), 727(a)(4)(C), 727(a)(4)(D) and 727(a)(6)(A) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). The Trustee commenced an adversary proceeding on June 28, 2000, with the filing of a complaint. Issue was joined by the filing of an answer on behalf of the Debtors on July 25, 2000.

A trial was conducted on November 8, 2000, at Utica, New York.¹² Following testimony by both Debtors, the parties were asked to file memoranda of law in lieu of closing arguments. The matter was submitted for decision on December 8, 2000.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A) and (J).

¹ At the trial, the Trustee indicated that he was discontinuing his causes of action at ¶¶ 3(E) and (F) of his complaint, in which he alleged that the Debtors had failed to obey an Order, dated December 22, 1999, requiring that the Debtors produce all writings, title instruments, bills of sale and other records concerning a 1990 Dorsey Trailer and a 1988 Utility Trailer (“Trailers”). The Trustee acknowledged that he had recovered and sold the Trailers, and the Debtors had provided him with the bank statements and check register and all other records with respect to the Debtors’ activities postpetition.

² Trustee’s Exhibits A-N and Debtors’ Exhibits 1-22 were received by stipulation.

FACTS

On September 30, 1997, the Debtors filed separate petitions pursuant to chapter 13 of the Code.³ On February 13, 1998, the Court granted the Debtors' motion for joint administration of the two cases. The Debtors' plan was confirmed on September 4, 1998.

At the trial, Owen testified that as a result of two of the Debtors' trucks having been repossessed sometime in 1999, the Debtors experienced a decrease in income which made it impossible for them to meet their expenses, including plan payments. In response to a motion by the chapter 13 trustee seeking dismissal of the cases pursuant to Code § 1307(c), the Court entered a Stipulated Conditional Order of Dismissal whereby the Debtors were required to convert their cases to chapter 7 before November 1, 1999. A Notice of Voluntary Conversion was filed by the Debtors on September 30, 1999. The Trustee was appointed on October 4, 1999, and the first meeting of creditors was scheduled for December 6, 1999.⁴

Owen testified that he understood that as a consequence of converting their cases to chapter 7, they were going to have to cease the operation of the trucking business. He testified that they continued to use the business checking account at Binghamton Savings Bank ("C&J Account") postconversion. On cross-examination, he indicated that he was not aware that he was not to use the C&J Account after the cases were converted. However, he later testified that he

³ The Debtors operated an interstate trucking company known as C&J Express Co. as partners. Colonello testified that she provided financing but had little to do with the day-to-day running of the business. It was her testimony that she answered phones and ran errands as necessary.

⁴ Colonello testified that she attended the meeting of creditors, but Owen apparently was unable to attend.

knew that he had to open a new account but had not done so, continuing to deposit monies into the C&J Account and to write checks on the account. The checks included those written to each of the Debtors to reimburse them for business expenses paid out of their personal funds.

Owen also testified that he used the 1988 Utility Trailer approximately three times postconversion (*see* Debtors' Exhibits 5-7), explaining that it was out on the road at the time of conversion and had to be brought back to New York State. He estimated that after expenses the Debtors netted approximately \$100-\$200 from those trips. Eventually, the 1988 Utility Trailer was left at 105 Airport Road, Maine, New York, along with the 1990 Dorsey Trailer, at a warehouse the Debtors had previously rented. The 1990 Dorsey Trailer was not used postpetition. Owen indicated that he continued to make deliveries using other trailers leased from a third party with the invoices being written in the name of C&J Express Company. *See* Debtors' Exhibits 8-19.

It was Owen's testimony that he had spoken to Robert Decker, a/k/a Jeff Decker ("Decker") about selling the Trailers to Decker and allowing Owen to continue to use them after they had been repaired. Owen testified that it was his intention to pay off the balance owed to Associates Commercial Corporation, a/k/a Associates Leasing, Inc., on the Trailers and to then attempt to refinance them. On or about November 4, 1999, he sold the Trailers to Decker for \$7,000, which was deposited into the C&J Account. *See* Debtor's Exhibit 3. Colonello testified that on November 8, 1999, she withdrew \$6,000 of the monies from the C&J Account, which she took to the office of the Debtors' attorney for payment of the arrears on her mortgage⁵ and also

⁵ The mortgage was not an obligation of the partnership. Both of the Debtors resided at the real property subject to the mortgage, however.

to pay the balance owing on the Trailers. Owen testified that he intended to use some of the monies he received from Decker to have the Trailers repaired.

Owen testified that from his point of view it was not until mid-November 1999 when the Trustee seized the C&J Account that the Debtors' trucking business actually ceased operations. According to Owen, at some point around the time the case was converted he had spoken to his attorney about seeking Court approval to allow him to keep the Trailers. On November 22, 1999, prior to the meeting of creditors, the Debtors filed a motion seeking an Order requiring Associates to accept payment from the Debtors and to compel Associates to release its liens on the Trailers. *See* Trustee's Exhibit G. Debtors also requested that the Trustee abandon his interest in the Trailers. *See id.* On November 26, 1999, the Trustee filed a motion seeking an Order compelling the Debtors to surrender the Trailers and turnover the business accounts and records. The same relief was also sought by way of a cross-motion by the Trustee in response to the Debtors' motion. The motions were heard on December 14, 1999, and on December 16, 1999, the Court signed an Order denying the relief sought by the Debtors. The Court signed an Order granting the Trustee's motion/cross-motion on December 22, 1999. *See* Trustee's Exhibit F.

A copy of the December 22nd Order was forwarded to Debtors' counsel on or about December 27, 1999. *See* Trustee's Exhibit I. A follow-up letter was sent to the Debtors' counsel on or about January 6, 2000, indicating that the Trailers were no longer at the Airport Road location and requesting that their whereabouts be provided to the Trustee, along with the Certificates of Title and other records requested in the Order. *See* Trustee's Exhibit J. By letter dated January 11, 2000, Debtors' counsel apprized the Trustee that the Trailers had been moved to a location in Binghamton, New York. *See* Trustee's Exhibit L. On or about January 14, 2000,

the Trustee sent a letter to Debtors' counsel confirming that the Trailers were in his possession and that the Debtors were to turn over the bank records and title instruments. *See* Trustee's Exhibit K. As noted at footnote 2, the Trustee acknowledged at the trial that he had received the bank statements and check register he requested, along with other records from the Debtors.

On January 31, 2000, the Trustee filed a motion to sell the Trailers. The motion was heard on February 15, 2000, and on March 13, 2000, the Court signed an Order granting the Trustee's motion. *See* Trustee's Exhibit B. The Trailers were ultimately sold by the Trustee for \$8,000 to a third party.

DISCUSSION

The denial of a discharge is among the harshest sanctions that may be imposed against a debtor by this Court. Because it amounts to a refusal to give the debtor the fresh start that is so central to the purpose of the bankruptcy laws, Code § 727 authorizes this remedy only for those acts of misconduct that most threaten the integrity of the courts.

Skaneateles v. Scott (In re Scott), 233 B.R. 32, 45 (Bankr. N.D.N.Y. 1998); *see also Cooley v. Patterson (In re Patterson)*, slip op. at 6 (Bankr. N.D.N.Y. Feb. 25, 1999). Accordingly, Code § 727 is to be construed liberally in favor of the debtor. *See In re Stevens*, 250 B.R. 750, 754 (Bankr. M.D.Fla. 2000) (citation omitted); *Patterson* at 6. As stated by the Court of Appeals for the Second Circuit,

Bankruptcy courts must exercise their powers so that “substance will not give way to form” and “technical considerations will not prevent substantial justice from being done.” (citation omitted) *
* * The denial of a discharge can work a serious deprivation upon a debtor . . . * * * Therefore, before denying a discharge, the

[court] should weigh the detriment to the proceedings and the dignity of the court against the potential harm to the debtor if the discharge is denied. [The court] should consider such factors as the intent behind the bankrupt's acts - was there injury to the creditors; and is there some way that the bankrupt could make amends for his conduct.

In re Kokoszka, 479 F.2d 990, 997-98 (2d Cir. 1973).

The party objecting to a debtor's discharge must prove the elements of Code § 727(a) causes of action by a preponderance of the evidence. *See Stevens*, 250 B.R. at 754, citing *Grogan v. Garner*, 498 U.S. 279 (1991); *Scott*, 233 B.R. at 42 (citation omitted). In this case, the Trustee argues that the Debtors should be denied a discharge based on their attempt to sell the Trailers to Decker and the removal of the Trailers from their initial location at the Airport Road location in Maine, New York. The Trustee also contends that the Debtors continued use of the monies in the C&J Account postconversion also warrants the denial of their discharge.

Code § 727(a)(2)(B)

Pursuant to Code § 727(a)(2)(B), the Trustee in this case must establish that the Debtors transferred or removed or concealed the Trailers postconversion with the intent to hinder, delay or defraud the Trustee as an officer of the estate charged with custody of the property. 11 U.S.C. § 727(a)(2)(B). It is necessary that the Trustee prove actual, rather than constructive, fraudulent intent. *See In re Blonder*, 246 B.R. 147, 150 (Bankr. D.Conn. 2000). Recognizing that a debtor is unlikely to admit that his intent was fraudulent, the Trustee need only establish by circumstantial evidence the Debtors' fraudulent intent. *Id.* at 150-151. Intent may be inferred from various "badges of fraud," including

[C]oncealment of facts and false pretenses by the transferor, reservation by him of rights in the transferred property, his absconding with or secreting the proceeds of the transfer immediately after their receipt, the existence of an unconscionable discrepancy between the value of property transferred and the consideration received therefore . . .

Salomon v. Kaiser (In re Kaiser), 722 F.2d 1574, 1582 (2d Cir. 1983), quoting 4 COLLIER ON BANKRUPTCY ¶ 548.02[5] at 548-34 to 38 (L. King 15th ed. 1983) (footnotes omitted).

Owen acknowledged his sale of the Trailers to Decker postconversion and prior to seeking abandonment by the Trustee. The sale for \$7,000 appears to have been for fair consideration given the fact that the Trustee ultimately sold the Trailers for \$8,000. The monies were not secreted by the Debtors and, in fact, were deposited into the C&J Account and later withdrawn to pay Associates and Norwest Mortgage, Inc., through its attorneys. The deposit of the money, as well as the withdrawal, were clearly listed on the C&J Account statements eventually made available to the Trustee. The Trailers were moved from the Airport Road warehouse facility to ThermoKing in Binghamton, New York, where the Debtor testified he had suggested to Decker that they be taken for repairs. In response to the Trustee's inquiry, Debtors' counsel apprized the Trustee of the location of the Trailers, and the Trustee was able to take possession of them and eventually sell them. It was Owen's testimony that when he negotiated the sale of the Trailers with Decker, who admittedly was a friend of the Debtors, he had hoped to be able to obtain refinancing so that he could eventually get them back. The fact that the Debtors filed a motion seeking abandonment of the Trustee's interest in the Trailers, albeit after the alleged sale occurred but prior to any motion by the Trustee for turnover, gives credence to the view that the Debtors were not attempting to conceal assets of the estate and had made the transfer without any intent

to hinder, delay or defraud either the Trustee or the creditors of the estate. Therefore, the Court will dismiss the Trustee's cause of action based on Code § 727(a)(2)(B).

Code § 727(a)(3)

Code § 727(a)(3) states that

The court shall grant the debtor a discharge, unless the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3).

Code § 727(a)(3) is intended to ensure that the Trustee and the creditors receive sufficient information to assess the financial condition of the Debtors. *See In re Sethi*, 250 B.R. 831, 837 (Bankr. E.D.N.Y. 2000) (citations omitted); *In re Craig*, 252 B.R. 822, 828 (Bankr. S.D.Fla. 2000). The Trustee has the burden of showing that the books and records of the Debtors were inadequate to provide such information. As stated by the Court of Appeals for the Second Circuit,

[T]he law . . . does not require that [the debtor's books and records] . . . be kept in any special form of accounts. It is a question in each instance of reasonableness in the particular circumstances. Complete disclosure is in every case a condition precedent to the granting of a discharge, and if such disclosure is not possible, without the keeping of books or records, then the absence of such amounts to that failure to which the act applies.

In re Underhill, 82 F.2d 258, 259-60 (2d Cir. 1936).

In evidence are the Debtors' bank statements for the months of August - December 1999, along with copies of the checks listed in the statements. *See* Debtors' Exhibits 1-4. The Debtors also provided copies of Invoices 4030-4044, issued by C&J Express Company in October 1999. *See* Debtors' Exhibits 5-19. In addition, the Trustee offered into evidence a transaction log for C&J Express Company, covering January 19, 1999 through December 31, 1999. *See* Trustee's Exhibit D. There was no testimony nor evidence presented to suggest that these items were inadequate to provide the Trustee with sufficient information to assess the Debtors' financial status. Based on the above, the Court will dismiss the Trustee's cause of action based on Code § 727(a)(3).

Code § 727(a)(4)(C)

Code § 727(a)(4)(C) relates to extortion or bribery. *See In re Aiken*, 80 B.R. 971, 973 (Bankr. E.D.Mo. 1988); *In re Chipwich, Inc.*, 64 B.R. 670, 678 (Bankr. S.D.N.Y. 1986). Nothing in the Trustee's allegations in his complaint, nor in the evidence presented at trial suggest that the Debtors were involved in any form of extortion or bribery. Therefore, the Court will dismiss the Trustee's cause of action based on Code § 727(a)(4)(C).

Code § 727(a)(4)(D)

Code § 727(a)(4)(D) provides:

The court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case, withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents,

records and papers, relating to the debtor's property or financial affairs.

11 U.S.C. § 727(a)(4)(D).

The Debtors were under an affirmative duty to comply with any requests of the Trustee upon conversion of their case. *See In re Erdheim*, 197 B.R. 23, 28 (Bankr. E.D.N.Y. 1996) (citations omitted). This includes providing the Trustee with any and all requested documents necessary for his administration of the case. *Id.* At the trial, the Trustee acknowledged that the Debtors had provided him with the bank statements and check register, as well as all other records concerning the Debtors' activities postpetition. While the Debtors obviously should have been more prompt in furnishing the Trustee with the documents, there is nothing in the evidence presented to indicate that the Debtors' delay was in any way fraudulent. Accordingly, the Court will dismiss the Trustee's cause of action based on Code § 727(a)(4)(D).

Code § 727(a)(6)(A)

Pursuant to Code § 727(a)(6)(A), a debtor may be denied a discharge if it is determined that he/she refused to obey "any lawful order of the court" The Trustee alleges that following the Debtors' conversion of their cases from chapter 13 to chapter 7, they continued to operate the trucking business, using property and monies that were subject to the Trustee's possessory interest without leave of the Court and in violation of the order of conversion. As noted above, the Debtors certainly had an obligation to cooperate with the Trustee and any refusal on their part to comply with an order of this Court would warrant a denial of their discharge. *See Patterson* at 7. Mere failure to obey an order is not sufficient. *Id.* (citations omitted). It is also

necessary that the Trustee establish that the Debtors wilfully and intentionally disobeyed an order of this Court. *Id.* In this case, the Trustee has presented no evidence that the Debtors refused to comply with any order of conversion. In point of fact, there was no “order of conversion.” Therefore, the Court finds no basis to support a denial of discharge of the Debtors pursuant to Code § 727(a)(6)(A).

While the Court finds that the Trustee has not met his burden of proof to warrant a denial of the Debtors’ discharge, the Court feels compelled to comment on the Debtors’ conduct, if only to make it clear that the Court does not view with favor the Debtors’ actions in this matter. While they did not rise to the level of fraud, nevertheless, their failure to act promptly upon conversion of their case interfered with the Trustee’s ability to administer the case in an expeditious manner. Debtors who seek to receive a “fresh start,” as well as their attorneys, should be mindful of the obligation to assist the trustee in the administration of the debtor’s estate. This becomes particularly critical when, as were the cases herein, there is a business involved and the Trustee is required to review business records and perform an accounting. Mr. Owen, in particular, demonstrated a reckless disregard for the Trustee’s role by continuing the use of the C&J Account and the operation of at least one of the Trailers postconversion. Accordingly, pursuant to Code § 105, the Court believes it appropriate that Mr. Owen reimburse the Trustee for his reasonable attorney’s fees and expenses incurred in having to commence this adversary proceeding before the Court will grant him a discharge.

Based on the foregoing, it is hereby

ORDERED that the Trustee’s complaint seeking denial of the Debtors’ discharge pursuant to Code § 727(a)(2)(B), 727(a)(3), 727(A)(4)(C), 727(a)(4)(D) and 727(a)(6)(A) is denied; it is

further

ORDERED that the Trustee shall file and serve on Debtors' counsel an affidavit identifying the attorney's fees and expenses incurred in connection with the adversary proceeding herein within thirty (30) days of the date of this Order; it is further

ORDERED that Owen's counsel shall have fifteen (15) days from the receipt of the Trustee's affidavit to file an objection with the Court with respect to the Trustee's attorney's fees and expenses; otherwise within sixty (60) days of the date of this Order, Owen shall reimburse the Trustee for said fees and expenses and provide the Court with proof in affidavit form of said payment;

ORDERED that Colonello be granted a discharge; and it is finally

ORDERED that Owen shall be granted a discharge upon receipt of proof of payment of the Trustee's attorney's fees and expenses.

Dated at Utica, New York

this 25th day of May 2001

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge